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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ownit Mortgage Solutions, Inc.¹

Serial No. 78342465

Darren S. Rimer of Rimer & Mathewson LLP for Ownit Mortgage Solutions, Inc.

Steven Foster, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Grendel, Walsh and Cataldo, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

On December 17, 2003, Ownit Mortgage Solutions, Inc. (applicant), through its predecessor, filed an application to register the mark RightLoan in standard-character form on the Principal Register for services identified as "mortgage banking" in International Class 36. Applicant

¹ William Dallas filed the application and assigned it to Ownit Mortgage Solutions, Inc. in a document recorded at Reel 3153/Frame 0410.

alleges first use of the mark anywhere on November 1, 2003 and first use of the mark in commerce on December 10, 2003.

The examining attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), in view of two prior registrations:

Reg. No. 1801254, owned by Residential Loan Centers of America, Inc. ("RLCAI"), for the mark THE RIGHT LOAN, ALWAYS in standard-character form for services identified as "providing mortgage loan brokerage services and loans" in International Class 36. The registration issued on December 30, 2003; the registration claims both first use anywhere and first use of the mark in commerce on March 24, 2003; and

Reg. No. 2869838, owned by Mortgage Shoppers Network, Inc. ("MSNI"), for the mark THE RIGHT LOAN @ THE RIGHT PRICE in standard-character form for services identified as "real estate 1st and 2nd trust deed, home equity loan, and debt consolidation loan brokering" in International Class 36. The registration issued August 3, 2004; the registration claims both first use anywhere and first use of the mark in commerce on May 1, 2001.

Applicant has appealed. Applicant and the examining attorney have filed briefs. Applicant did not request an oral hearing. We affirm the refusal as to both cited registrations.

LIKELIHOOD OF CONFUSION

Section 2(d) of the Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant,

to cause confusion ..." 15 U.S.C. § 1052(d). To determine whether there is a likelihood of confusion, we must consider all evidence of record bearing on the factors delineated in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977). Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the services of the applicant and registrant. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In addition to those factors, we will also address applicant's and the examining attorney's arguments relating to other factors, and applicant's argument that factors other than the marks and the services are of particular importance in this case.

We will consider the refusal with regard to each of the cited registrations separately. However, before we do so, we will address issues with applicant's evidence common to both registrations.

Applicant's Evidence

In the case of both registrations, applicant has provided evidence from websites allegedly related to each of the owners of the cited registrations. Based on this evidence applicant makes numerous arguments. For example, applicant argues that both registrants use their respective

company names or "house marks" along with the registered mark, and that the presence of the house marks would avoid confusion. Applicant also argues that the manner of display of the cited registered marks and other uses of the words "right loan" on those websites would avoid confusion with its mark.

Both cited registrations display the marks in standard-character form, and as such, we must consider that each of the marks could be used in any manner of display within reason. The cited registrations are "prima facie evidence of the validity of the registered mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate." See Trademark Act Section 7(b), 15 U.S.C. § 1057(b).

To the extent applicant attempts to use extrinsic evidence to show how each registrant uses its registered mark, we have not considered it for that purpose. Vornado, Inc. v. Breuer Electric Mfg. Co., 390 F.2d 724, 156 USPQ 340, 342 (CCPA 1968) ("... the display of a mark in a particular style is of no material significance since the display may be changed at any time as may be dictated by

the fancy of the applicant or the owner of the mark."). More specifically, we may not and have not considered applicant's evidence purporting to show that the registrants actually use the registered marks in a particular manner of display, nor have we considered applicant's evidence purporting to show that the registrants actually use their registered marks with their company names, house marks or similar subject matter.

Furthermore, in its brief applicant has both cited and discussed numerous cases which originated in the district courts. These cases involve infringement and similar claims where the focus is on the actual use of marks. These cases are of limited relevance here due to our focus in this proceeding on the particulars of the application and registrations, not actual use. In re Bercut-Vandervoort & Co., 229 USPQ 763, 765 (TTAB 1986) ("... that [cited] case is clearly distinguishable from the present one since that case involved a trademark infringement action, rather than a proceeding to determine whether an applicant is entitled to federal registration of the mark as shown in the application and as used on the goods described in the application.").

Reg. No. 1801254 - THE RIGHT LOAN, ALWAYS

Comparison of the Services

Applicant identifies its services as "mortgage banking." The services in Reg. No. 1801254 for the THE RIGHT LOAN, ALWAYS mark are identified as "providing mortgage loan brokerage services and loans."

To find goods or services related for the purposes of Trademark Act Section 2(d), the goods or services need not be identical. The goods or services need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the services originate from the same source. On-Line Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000).

In this case the examining attorney has argued that applicant's "mortgage banking" services are broad enough to include the registrant's services of "providing mortgage loan brokerage services and loans." The examining attorney has provided dictionary definitions to support this position. Even without the help of those definitions we would assume that "mortgage banking" services include at least "loans." Furthermore, applicant has not argued that the services in the application and registration differ.

Accordingly, we conclude that the services of applicant and registrant are overlapping and otherwise related.

Furthermore, we note that, "the degree of similarity [between the marks] necessary to support the conclusion of likely confusion declines" when the goods or services are identical. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1992).

Comparison of the Marks

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of both marks. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In comparing the marks we must look to the marks as they appear in the application and registration. See Vornado, Inc. v. Breuer Electric Mfg. Co., 156 USPQ at 342.

The words "RIGHT LOAN" comprise applicant's entire mark, RightLoan, and the most prominent element in the registered mark, THE RIGHT LOAN, ALWAYS. Consequently, RIGHT LOAN is the dominant element in both marks. The article "THE" does nothing to differentiate the marks, nor does applicant's presentation of the words RightLoan without a space. The presence of the final word "ALWAYS"

differentiates the sound and appearance of the marks somewhat, but it reinforces the connotation and commercial impression which both marks share. That is, both marks suggest that applicant and registrant offer many options for its customers and applicant and registrant will provide a service which fits the needs of each individual customer. The strong similarity in connotation and commercial impression overrides any minor differences between RightLoan and THE RIGHT LOAN, ALWAYS in appearance and sound.

In concluding that RIGHT LOAN is the dominant element in both marks, we are mindful of the necessity to view the marks overall, as applicant urges, and we have done so. However, it is also true that greater weight may be given to one feature in that overall assessment. As the Court of Appeals for the Federal Circuit observed, "... in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety. Indeed, this type of analysis appears to be unavoidable." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

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Accordingly, we conclude that the marks, RightLoan and THE RIGHT LOAN, ALWAYS, are similar.

Reg. No. 2869838 - THE RIGHT LOAN @ THE RIGHT PRICE

Comparison of the Services

Again, applicant identifies its services as "mortgage banking." The services in Reg. No. 2869838 for the THE RIGHT LOAN @ THE RIGHT PRICE mark are identified as "real estate 1st and 2nd trust deed, home equity loan, and debt consolidation loan brokering."

To find goods or services related for the purposes of Trademark Act Section 2(d), the goods or services need not be identical. The goods or services need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the services originate from the same source. On-Line Careline Inc. v. America Online Inc., 56 USPQ2d at 1471.

In this case also the examining attorney has argued that applicant's "mortgage banking" services are broad enough to include the registrant's services, "real estate 1st and 2nd trust deed, home equity loan, and debt consolidation loan brokering" based on dictionary definitions. Here too, without any help from those definitions, we would assume that "mortgage banking" is

closely related to "real estate 1st and 2nd trust deed, home equity loan, and debt consolidation loan brokering."

Again, applicant has not argued that the services in the application and registration differ. Accordingly, we conclude that the services of applicant and registrant are closely related.

Comparison of the Marks

Here too, in comparing the marks we must consider the appearance, sound, connotation and commercial impression of both marks. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 73 USPQ2d 1689 at 1692.

In comparing the marks we must look to the marks as they appear in the application and registration. See Vornado, Inc. v. Breuer Electric Mfg. Co., 156 USPQ at 342.

Again, the words "RIGHT LOAN" comprise applicant's entire mark, RightLoan, and the most prominent, element in the registered mark, THE RIGHT LOAN @ THE RIGHT PRICE. In this case it is of particular importance that the phrases "RightLoan" and "THE RIGHT LOAN," which are for all intents and purposes identical, each come first in the respective marks. Presto Products, Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988) ("... [it is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser

and remembered."). Consequently, RIGHT LOAN is the dominant element in both marks. Again, the article "THE" does nothing to differentiate the marks, nor does applicant's presentation of the words RightLoan without a space.

The presence of the final phrase "... @ THE RIGHT PRICE" differentiates the sound and appearance of the marks, but it enhances, but does not alter, the connotation and commercial impression which both marks share. That is, both marks suggest that applicant and registrant offer many options for customers and that they will provide a service which fits the needs of each individual customer. The phrase "@ THE RIGHT PRICE" adds the suggestion that the service is economical, a suggestion which is part and parcel of the suggestion that the services will fit the needs of the individual. Here too, the strong similarity in connotation and commercial impression overrides the differences between RightLoan and THE RIGHT LOAN @ THE RIGHT PRICE marks in appearance and sound. The differences in sound and appearance in this case are more significant than the difference noted with regard to the THE RIGHT LOAN, ALWAYS mark, but still not sufficient to override the similarity in connotation and commercial impression between applicant's mark and the registered mark.

Here too, in concluding that RIGHT LOAN is the dominant element in both marks, we again are mindful of the necessity to view the marks overall, as applicant urges, and we have done so. Here too, greater weight may be given to one feature in that overall assessment. As we noted above, "... in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." In re National Data Corp., 224 USPQ at 751.

Accordingly, we conclude that the marks, RightLoan and THE RIGHT LOAN @ THE RIGHT PRICE, are similar.

In concluding that "RightLoan" is similar to both cited marks, we note that applicant seeks to register "RightLoan" alone, while each of the cited marks include additional elements which arguably distinguish them from one another. Furthermore, and more importantly, here we must judge the registrability of applicant's mark and not judge actions taken in previous applications. In re Nett Designs, Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Other Factors Related to Both Cited Registrations

Applicant states, "Although there are some similarities in these marks, an examination of many other relevant factors, in the aggregate, prevent any likelihood of confusion between Appellant's mark and the cited marks." Here, we will discuss the "other" du Pont factors applicant references. For the most part applicant does not distinguish between the two cited registrations in this regard. Accordingly, this discussion applies to both cited registrations unless we indicate otherwise.

Du Pont Factor (6) - *The number and nature of similar marks in use on similar goods.* Applicant makes a number of arguments which relate to this du Pont factor and more broadly to the "strength" or "weakness" of the marks at issue here.

First, applicant argues that the individual words "right" and "loan" are descriptive of loan services based on definitions of each word and that consequently this "necessarily limits the scope of protection which can be accorded to any of the cited registrations."

Applicant also argues that the existence of multiple registrations for similar services for marks which include "RIGHT LOAN" indicates that consumers are able to distinguish among the marks in this "crowded field." The

registrations applicant relies upon for this purpose consist of the two cited registrations and another registration for the mark DO YOU HAVE THE RIGHT LOAN, also owned by RLCAI, (Reg. No. 2801253) for "providing mortgage bank brokerage services and loans."

Applicant also provided voluminous Internet evidence consisting of results pages from the Google® search engine, and numerous examples of web pages from those results. Applicant indicates that one Google® search for "the right loan" produced 437,000 results, and another for "right loan" produced 460,000 results. Applicant provided a limited number of the results pages.² Applicant also provided "a representative sample of web pages resulting from the first one hundred hits" from its search for "the right loan." Applicant also indicates that in a similar search for "right loan" and "right price" it found 6,700 results and applicant provided "a sampling of the top 100 hits for these search terms."

² The appearance of terms in abbreviated listings of results from search engines is of limited probative value. In re Fitch IBCA, Inc., 64 UDPQ2d 1058, 1060 (TTAB 2002). Likewise, the mere statement of the number of hits from a particular search is of limited value.

In sum we find applicant's evidence of the weakness of "RIGHT LOAN" as applied to mortgage banking or related fields unpersuasive.

At different points in its brief applicant asserts that the individual words and the combination "RIGHT LOAN" are either descriptive or suggestive. First, the definitions of the individual words "right" and "loan," by themselves, are not at all probative of the strength of "RIGHT LOAN" as a mark or component of a mark. In considering the strength or weakness of the marks at issue, the proper focus is the "RIGHT LOAN" combination, more particularly, the use of "RIGHT LOAN" *as a mark* (or as part of a mark) for mortgage banking and related services. In re E. I. du Pont de Nemours & Co., 177 USPQ 563 at 567.

Also, we find applicant's argument that "RIGHT LOAN" is descriptive particularly unpersuasive. For example, applicant argues that the use of "RIGHT LOAN" in the registered mark DO YOU HAVE THE RIGHT LOAN, also owned by RLCIA, somehow indicates registrant's own descriptive use of "RIGHT LOAN." We reject applicant's argument, based on this or any other evidence of record, that "RIGHT LOAN" is merely descriptive. As the examining attorney points out, this argument even contradicts applicant's own claim that

it is entitled to register its own mark which consists of "RightLaon" alone.

With regard to the registrations, applicant identifies only three. The examining attorney has cited two of those, and RLCAI, which owns one of the cited registrations, also owns the third "RIGHT LOAN" registration. This is hardly sufficient to establish that "RIGHT LOAN" is weak.

Also, the Court of Appeals for the Federal Circuit recently has urged caution in relying on third-party registrations for this purpose noting that registration alone does not establish that a term is weak and that the probative value of third-party trademarks depends entirely upon their usage. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 73 USPQ2d at 1693. In this case, even if we give applicant the benefit of the doubt and assume that the marks in the third-party registrations are in use, we find the evidence insufficient to establish that "RIGHT LOAN" is weak in the mortgage banking or related fields. Cf. Pizza Inn Inc. v. Russo, 221 USPQ 281, 282 (TTAB 1983).

Next, with regard to the Internet evidence, in spite of the huge volume of evidence, we find no evidence of the use of "RIGHT LOAN" as a mark or as a component of a mark, other than uses by the two cited registrants. Applicant

does point to frequent uses of "right loan" in text or even in headings on various web pages. Applicant summarizes its Internet evidence as to "right loan" as follows:

... it is very common for mortgage companies to speak of "Choosing the Right Loan" (note the capital letters, which do not connote trademark significance), "find the right loan", "How to Choose the Right Loan for All Your Needs", "How to Choose the Right Loan", "how to find the right loan", "The Right Loan for You", "Our charter is to get you the right loan", "The Right Loan for You", "getting the right loan", "What is the right loan for you", and the like. Because the term is often displayed as a heading, as in "The Right Loan For You", many companies use this term in a purely descriptive sense to describe their services of offering mortgage loans. Such term is not being used by such parties in a trademark sense, and the same is true for the cited registrations...

After considering all of the Internet evidence applicant provided, including similar evidence with regard to uses of "right loan" with "right price," we conclude that it fails to establish that "RIGHT LOAN" is weak. While the words "right loan" or "right price" may be used by others in relation to their mortgage loan services as an integral part of text or headings in promoting the services, the uses are neither descriptive uses nor service-mark uses. Nor does this evidence establish that either "right loan" or "right price" have a commonly understood descriptive meaning in the mortgage banking or related fields.

Furthermore, we again reject applicant's argument that the cited marks themselves are merely descriptive. As we indicated, we must presume that the cited marks are valid in accordance with Trademark Act Section 7(b), as we indicated above.³

Accordingly, on this record we are not persuaded that the registered marks are weak, and therefore, only entitled to a limited scope of protection, as applicant argues.

Du Pont Factor (4) - *The conditioners under which and the buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.* Applicant argues that because purchasers "will be spending more than one thousand dollars on their mortgage" (or more) confusion is not likely. While customers for mortgage loans may not act on impulse, we cannot conclude that such purchasers are sophisticated. Such purchasers could include a wide spectrum of the public. Furthermore, even sophisticated purchasers are not immune from trademark confusion. In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983).

Accordingly, we conclude that the sophistication of the potential purchasers will not avoid confusion in this case.

³ Also, as we indicated above, we cannot and have not considered applicant's arguments based on extrinsic evidence that the registrants have purportedly misused their marks in a descriptive sense.

Du Pont Factor (5) - Fame. Applicant also argues that the marks in the cited registrations are not famous. In fact, there is no evidence that the marks in the cited registrations are famous. However, the absence of fame in no way supports applicant's case. In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ("... we decline to establish that the converse rule that likelihood of confusion is precluded by a registered mark's not being famous."). The fame factor does not enter into our determination in this case.

Du Pont Factor (8) - Actual Confusion. Applicant also argues that the absence of actual confusion indicates no likelihood of confusion. There is no evidence that there has been an opportunity for confusion to occur in this case as to either registrant. Furthermore, particularly in an ex parte proceeding, "uncorroborated statements of no known instances of actual confusion are of little evidentiary value." In re Majestic Distilling Co., 65 USPQ2d at 1205. See also In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984). Therefore, we find applicant's argument regarding actual confusion unpersuasive.

Applicant also argues, apparently on the basis of du Pont factors 11, 12 and 13, that we must consider the marks as consumers will encounter them in the marketplace and

that, when so considered, we must conclude that any confusion will be de minimis. In so arguing applicant relies heavily on the materials allegedly from the web sites of both registrants. As we indicated above, we cannot and have not considered this extrinsic evidence for the purpose of evaluating the actual use of the cited marks by the registrants. Therefore, we find applicant's arguments with regard to du Pont factors 11, 12 and 13 unpersuasive.

Accordingly, we find applicant's arguments with regard to the "other" du Pont factors, that is, those related to factors other than the marks and the services of the applicant and registrants, unpersuasive either considered alone or in the aggregate.

CONCLUSION

In sum, after considering all evidence of record bearing on the du Pont factors, we conclude that there is a likelihood of confusion in this case with regard to both cited registrations. We conclude so principally due to the similarity between applicant's mark and the marks in both cited registrations and the close relationship between applicant's services and the services identified in both cited registrations.

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Decision: The refusal to register applicant's mark under Section 2(d) of the Act is affirmed with regard to both Reg. Nos. 1801254 and 2869838.